Supreme Court, U.S.
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No. 85-1843

In The
Supreme Court of the United States
October Term, 1985

THOMAS M. RETTIG; EVA O. RETTIG,
Petitioners,

v.

THE KENT CITY SCHOOL DISTRICT, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioners are precluded by the doctrine of res judicata from seeking review by this Court of the questions presented in their petition for a writ of certiorari.

2. Whether the Kent City School District was required by the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*, to provide Thomas Rettig with at least one (1) hour per week of extracurricular activity during the 1981-1982 school year.

LIST OF ALL PARTIES

Petitioners:

Thomas M. Rettig
Eva O. Rettig

Respondents:

Kent City School District
Dr. Donna G. Lightel (in her official capacity as Superintendent)

Michael Chrin (in his official capacity as Director of Child Study and Special Education)

State Board of Education

Dr. Franklin B. Walter(in his official capacity as State Superintendent)

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OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals for the Sixth Circuit filed on March 10, 1986, has not yet been officially reported. The Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, filed on January 26, 1984, is not officially reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was filed on March 10, 1986. The petition for a writ of certiorari was filed on May 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

This matter is now before this Court for the second time. The case was originally initiated in February of 1978 when the Petitioners requested an impartial due process hearing, pursuant to the provisions of the Education for All Handicapped Children Act of 1975 (hereinafter referred to as the EAHCA), 20 U.S.C. § 1401 *et seq.*, questioning the quality of the special education being provided to Thomas by the Kent City School District. On April 30, 1979, the impartial hearing officer issued a comprehensive opinion which concluded that the Kent City

School District was providing Thomas a free appropriate public education as required by the EAHCA. The State Board of Education affirmed the hearing officer's decision.

Thereafter, the Petitioners commenced an action in the United States District Court for the Northern District of Ohio, Eastern Division, on November 30, 1979. The Petitioners sought a review of the state decision pursuant to 20 U.S.C. § 1415(e)(2), asserted violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and alleged constitutional infringements pursuant to 42 U.S.C. § 1983. After a trial on the merits, the District Court rendered its final order on August 25, 1981. The District Court upheld the impartial hearing officer's decision and found in favor of the Respondents on the vast majority of the issues. The District Court did, however, order the Kent City School District to incorporate one (1) hour of extracurricular activity each week in Thomas' 1981-1982 Individualized Educational Plan (IEP). This decision of the District Court is reported as *Rettig v. Kent City School District,* 539 F.Supp. 768 (N.D. Ohio 1981).

The Petitioners appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit, and the Kent City School District cross-appealed from the decision mandating the inclusion of one (1) hour of extracurricular activities per week in the future IEP of Thomas. On November 8, 1983, the Court of Appeals filed its decision. The Court vacated that portion of the District Court's decision concerning extracurricular activities and remanded this single issue to the District Court for further consideration in light of the decision of this Court in *Board of Education of the Hendrick Hudson Central*

School District v. Rowley, 458 U.S. 176 (1982). In all other respects, the Court of Appeals affirmed the District Court's judgment. This decision of the Court of Appeals is reported as *Rettig v. Kent City School District,* 720 F.2d 463 (6th Cir. 1983).

This decision of the Court of Appeals was appealed by the Petitioners to this Court on or about February 29, 1984. On May 21, 1984, this Court entered its order dismissing the appeal or in the alternative denying the petition for a writ of certiorari. *Rettig v. Kent City School District,* — U.S. —, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). This Court also denied the Petitioner's application for rehearing on June 18, 1984. *Rettig v. Kent City School District,* — U.S. —, 104 S.Ct. 3549, 82 L.Ed.2d 852 (1984).

Meanwhile, on January 26, 1984, the District Court issued its order with respect to the single issue which had been remanded to it by the Court of Appeals. The District Court affirmed its earlier decision ordering one (1) hour of extracurricular activities per week. Thereafter, on February 21, 1984, the Respondent, Kent City School District, appealed to the Court of Appeals, and on February 27, 1984, the Petitioners cross-appealed.

On March 10, 1986, the Court of Appeals issued its decision which reversed the judgment of the District Court and dismissed the Petitioner's cross-appeal because it raised issues "that were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court." Slip Opinion, p. 7.

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SUMMARY OF ARGUMENT

The issues raised in the petition for a writ of certiorari were not addressed by the Court of Appeals and are barred by the doctrine of res judicata.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982), this Court held that a handicapped child receives a free appropriate public education pursuant to the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.,* when he is being provided "personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction," and that, in enacting the Act, it was not Congress' intent "to achieve strict equality of opportunity or services." The Court of Appeals correctly applied these standards in determining that the Kent City School District was not obligated to provide extracurricular activities to Thomas Rettig from which he would receive no significant educational benefit.

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ARGUMENT

In *Allen v. McCurry,* 449 U.S. 90 (1980), this Court stated that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." 449 U.S. at 94. In *Nevada v. United States,* 463 U.S. 110 (1983), this Court again defined res judicata, stating:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the

> merits of a case, "[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac,* 94 U.S. 351, 352 (1876). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948).
>
> 463 U.S. at 129-130

As stated above, the case *sub judice* is before this Court for the second time. Previously, this Court declined to grant certiorari to review the decision of the Court of Appeals rendered in 1983. *Rettig v. Kent City School District,* 720 F.2d 463 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). This earlier case involved the same parties and the same issues which the Petitioners are again seeking to present to this Court. The latest decision of the Court of Appeals, issued on March 10, 1986, was concerned only with the single issue relating to extracurricular activities. Accordingly, the Respondents respectfully submit that this Court should decline to issue a writ of certiorari in the case *sub judice,* because the questions presented in the petition are barred by the doctrine of res judicata. As the Court of Appeals concluded, these issues "were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court." Slip Opinion, p. 7.

In *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981), this Court stated:

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 525, 51 S.Ct. 517, 518, 75 L.Ed. 1224 (1931). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).
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> 452 U.S. at 401

Thus, in light of today's crowded dockets and the significant public interests served by the doctrine of res judicata, the Respondents respectfully submit that the Petitioners, having fully litigated their claims through the federal court system, are now precluded from again seeking to have their claims reviewed by this Court.

With respect to the single issue considered by the Court of Appeals, the Respondents, like the Court of Appeals, believe that the controlling principles are set forth in this Court's decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). This Court held in *Rowley* that the requirements contained in the EAHCA that a state provide specialized educational services to handicapped pupils generate "no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided to other children.'" 458 U.S. at 198. This Court further concluded

that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." 458 U.S. at 192. The Court reasoned that a state could meet its obligations under the EAHCA "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." 458 U.S. at 206. The Court further said that a handicapped child's IEP satisfied the requirements of the EAHCA if it is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207. Finally, the Court made it clear that, in enacting the EAHCA, Congress did not intend "to achieve strict equality of opportunity or services." 458 U.S. at 198.

The Respondents respectfully submit that the Court of Appeals correctly applied the foregoing guidelines in the present case. The Court of Appeals, in an opinion by Judge Krupansky, stated:

> Plaintiffs argue that the extra-curricular requirement imposed by the district court can be independently supported because the requirement was necessary to permit Thomas to benefit from his educational program. The Rettigs contend that Thomas' "free appropriate public education" should include activities required to assist him to "benefit from special education." 20 U.S.C. § 1401(17). However, the state-appointed hearing officer determined that because of Thomas' "sporadic and recurring behavior, including, regurgitation, lack of interest, self-stimulating activities, and bladder accidents," he was unable to significantly benefit from extra-curricular programs. Accordingly, the school district was not obligated to provide extra-curricular activities from which Thomas would receive no significant educational benefit.
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> Slip Opinion, p. 7

In light of the foregoing, the Respondents respectfully submit that it is readily apparent that the Court of Appeals has faithfully applied the directives given by this Court in *Rowley,* and that the Kent City School District was and is continuing to provide Thomas Rettig with a free appropriate public education under the provisions of the EAHCA.

Finally, the Respondents direct the Court's attention to Sup. Ct. R. 21.5, which provides that the failure of the petitioner "to present with accuracy, clarity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." The Respondents submit that the Petitioners have failed to comply with this standard in the case *sub judice,* and accordingly, their petition should be denied on this basis.

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CONCLUSION

Based upon the foregoing, the Respondents strongly urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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